Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF CBS INC.

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Summary Of Comments Of CBS Inc.

This proceeding is intended to promote two important goals of the Communications Act -- localism and economic competition. The Commission should view its role as a ministerial one which focuses on implementing the plain language of the 1992 Act and the clear intent of its legislative history. It should limit itself to communications policy issues and should not attempt to resolve copyright-related or contractual issues which are not germane to this proceeding.

In defining the terms used in the 1992 Act, including the phrase "multichannel program distributor", the Commission should give effect to the Congressional intent that the agency's rules permit the "fullest application" of retransmission rights. Similarly, in considering other "nuts-and-bolts" implementation issues, the Commission should favor flexibility for broadcasters in controlling the distribution of their signals.

The Commission has discretion to require that a retransmission consent election be made reasonably prior to the date it is to be effective, such as 60 days in advance. If no election is made, the most reasonable interpretation of the 1992 Act is that the station's cable carriage would be governed by the "must-carry" rules.

While the Commission should generally refrain from detailed regulatory oversight at this point, the 1992 Act requires it to adopt rules to implement certain statutory limitations on the scope of retransmission consent, including the exemption from the consent requirement for the retransmission of network station signals to home earth stations at otherwise "unserved households." In response to this mandate, the Commission should adopt a procedure to administer these statutory limitations along the lines proposed by the National Association of Broadcasters.

The combination of new Sections 614(b)(3) and 325(b) leads to the reasonable conclusion that the schedule of a broadcast station's signal carried on a cable system under a retransmission consent option must be carried in its entirety, without material degradation and including Line-21 captioning and other ancillary services.

The Commission does not need to, and should not, explore in this proceeding copyright issues involved in the relationship between broadcast stations and program suppliers. Retransmission consent is a concept grounded in communications policy, not copyright law, and the exercise of retransmission consent rights related to a station's signal is not dependent on consent of the copyright proprietors of individual programs.

Even where copyright law is not involved, the Commission should not undertake at this time to adopt a pervasive regulatory scheme to govern the wide variety of contractual arrangements among affected parties which will undoubtedly develop in the context of retransmission consent implementation. If market failures or other problems emerge which impede the intent of Congress to "permit the fullest applications" of retransmission consent rights, the Commission can deal with them as they arise.

Finally, the Commission should consider any rate regulation issues arising from implementation of retransmission consent in the context of its overall cable rate regulation proceeding.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, submits its comments in response to the Notice of Proposed Rulemaking, FCC 92-499, released in the above proceeding on November 19, 1992 ("Notice"). In this proceeding, which is required by the Cable Television Consumer Protection and Competition Act of 1992[1], the Commission seeks comments "on the adoption of implementing regulations relating to mandatory television broadcast signal carriage and retransmission consent." Notice at ¶1.

[1] Pub. L. No. 182-385, 102 Stat._____ (1992) ("1992 Act"). New Sections 614(f) and 325(b) of the Communications Act (47 U.S.C. 151ff), which were created by Sections 4 and 6 of the 1992 Act, mandate these proceedings.

Introduction

CBS believes that the 1992 Act presents the Commission with an opportunity to adopt two separate but complementary regulatory schemes which will, in a balanced way, guarantee that two important goals of Title III of the Communications Act of 1934 are effectuated in today's transformed video marketplace -- the preservation of localism and the facilitation of full and fair competition . Simply put, the Commission has been mandated by the Congress to assure that local broadcast stations will continue to be able to reach their audiences in the communities they are licensed to serve, and to effectuate a long overdue opportunity for stations which choose the "retransmission consent" option to negotiate arrangements for carriage of their signals by cable systems (and other multichannel video service providers) which take into account the value of those broadcast signals.

This proceeding is intended to implement the communications policy direction of the Congress as expressed in the 1992 Act and its legislative history, and the Commission's role is essentially ministerial. It should aim for simplicity and should concern itself only with matters directly related to facilitating the exercise of those must-

carry or retransmission consent rights. Specifically, it should not attempt to resolve copyright issues which are explicitly not germane to this proceeding; nor should it involve itself in contractual implementation issues which can not be defined, much less resolved, at this time.[2]

Because of our expectation that other broadcast industry parties will comment extensively on the implementation of "must-carry" rules for local commercial and noncommercial broadcast stations, these Comments focus on questions raised in the Notice related to the retransmission consent option, and we will speak to those issues in the order they are raised in the Notice.

Definitional Issues

As an introductory matter, the Notice states that the retransmission consent requirement applies to any "multichannel video program distributor" and asks what

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[2] There is no need to argue anew here the profound merit of the communications policy principles underlying the legislation. Suffice it to say that the retransmission consent provision of the 1992 Act corrects a regulatory imbalance which had existed since 1959 and which had been exacerbated by the development of the cable industry into a full-fledged competitor with broadcast stations for audiences, programming and advertising revenue. See, Senate Committee on Commerce, Science, and Transportation, S.Rep.No. 92, 102d Cong., 1st Sess. (1991) ("Senate Report") at 35.

entities that term should be interpreted to encompass. Notice at ¶42. The definition finally adopted in the 1992 Act includes a nonexclusive list of such entities, which includes "a person, such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[3] The Senate version of the definition, which was adopted by the joint House/Senate conference committee report on the legislation[4], was identical to the definition which appears in the 1992 Act, but without the illustrative list. The Senate Report's discussion of that definition included specific mention of "wireless cable and satellite master antenna television" as examples of such distributors. Senate Report at p. 71.

CBS urges that the clear intent of the Congress in adopting the definition was to be inclusive, and there is no basis for the Commission's suggestion that it has been given

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[3] 47 U.S.C. Section 522(12).

[4] House Committee on Energy and Commerce, H.R. Report No. 862, 102d Cong., 2d Sess. (1992) ("Conference Report") at 58.

flexibility by the Congress to apply the rebroadcast regime only to those entities it determines to be in the same economic market as broadcast stations and "at the same distribution level as cable systems." Notice at ¶42. Further, the applicability of retransmission consent certainly should not depend on "whether the entity involved is covered or not covered by the compulsory copyright licensing provisions of the Copyright Act." Notice at ¶54. As noted above, and as we discuss further infra, the Commission should resist the temptation to intermingle copyright issues with the communications policy issues which underlie the 1992 Act and this proceeding.

In regard to these threshold definitional issues, the Commission should take a narrow view of its role, and not exercise regulatory discretion which is inappropriate under the circumstances and which would tend to undermine and complicate the simple underlying premise of retransmission consent -- that broadcast stations should have the right, not just against selected competitors, but generally, to control the distribution of their signals.[5] Such a result would be

[5] CBS agrees with the Commission that, where there is a chain of distributors between the broadcast station and the public, "it would appear consistent with the objectives of the 1992 Act for the

consistent with the Congressional mandate to adopt "regulations which will permit the fullest applications of whichever rights each television station elects to exercise." Senate Report at p. 38.

The Scope of Retransmission Consent

In defining the scope of the retransmission consent requirement, the Notice recites the four statutory limitations on its operation, one of which is "retransmission directly to a home satellite antenna of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network, if the household receiving the signal is an unserved household."[6] Although, as discussed more fully below, CBS suggests that the Commission should generally refrain from detailed rules on retransmission consent enforcement at this point, the Congress has specifically required that the Commission adopt "such...regulations as are necessary to administer the[se] limitations... ."[7]

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obligation involved to inure to the distributor in the chain that interacts directly with the public." Notice at ¶42.

[6] 47 U.S.C. 325(b)(2)(C)

[7] 47 U.S.C. 325(b)(3)(A).

CBS suggests that the Commission should respond to this Congressional mandate along the lines suggested in the comments filed today in this proceeding by the National Association of Broadcasters. The mechanism proposed is simply an adaptation of the well-established and familiar procedures already applicable to cable operators under §76.9 of the Commission's Rules. Such procedures would be a relatively simple and straightforward way of administering the statutory limitations because the Commission would not be involved in enforcing the terms of retransmission consent agreements or program supply contracts, but would limit its inquiry to whether any agreement pertaining to the questioned retransmissions existed.

The Notice raises one other specific issue in its discussion of the scope of retransmission consent. That is, it construes the 1992 Act as intending that "a station must make the same [retransmission consent] election for all directly competing cable systems, but that it could make different elections for cable systems that are in the same local television market but do not overlap." Notice at ¶45. It then asks "what degree of overlap between cable system service areas should trigger the 'same election' requirement." Id.

CBS suggests that there is no "magic number", although the reference in the legislative history to "overbuild systems" implies that Congress's intent was that only very significant overlaps should be subject to the requirement. Senate Report at p.33. In general, in weighing the comments of the cable industry and others on this and other "nuts-and-bolts" implementation issues, the Commission should keep in mind the underlying goal of the 1992 Act to restore to broadcast stations the maximum possible flexibility in controlling the distribution of their signals.

Implementing Retransmission Consent

The Commission asks for comment on the appropriate date for the making of the election both initially and at the end of each triennial election period, and the degree of flexibility the Commission has in choosing such dates. Notice at ¶50. October 6, 1993 (one year from the enactment of the 1992 Act) is the date on which the retransmission consent provision takes effect, and the 1992 Act provides that television stations must be required to make their program carriage elections within that one-year period. 47 U.S.C. 325(b)(3)(B). We believe that this language gives the Commission discretion to adopt a date prior to October 6 by

which the election must be made and communicated to the affected cable systems.[8] Both the station and the cable system have an interest in an orderly negotiation process, and we suggest that it would be reasonable for the Commission to require that an election be made no later than 60 days prior to its effective date.

The Notice then asks whether there should be a "default election procedure" if a station fails to make a timely election under Section 325(b)(3)(B). Notice at ¶50. Although the 1992 Act and its legislative history do not broach the subject directly, the clear intent of the statute is that a station which does not make an affirmative election for retransmission consent status should be considered a "must-carry" station if it otherwise qualifies under Section 614.

That is, Section 614(a) creates the underlying cable carriage right:

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[8] The Commission proposes "to require each station to place a notarized copy of its election statement in its public file and to send a copy to every cable system within the station's market." Notice at ¶51. We suggest that, in markets with multiple cable systems, it should be sufficient for a station to transmit to each system only the election statement affecting that system. With that caveat, CBS has no objection to disclosing election statements in the manner proposed.

> "Each cable operator shall carry...the signals of local commercial television stations ... ."

Superimposed on this underlying right is the election procedure set forth in Section 325(b)(3)(B), which creates the retransmission consent option. The Senate Report characterizes the combined effect of these provisions as "requir[ing] carriage of all qualified local broadcasters not exercising their retransmission rights." Senate Report at p.63. Although the issue is not without ambiguity, we believe that the most reasonable implication from the language of the statute and the legislative history is that if a station does not exercise its retransmission consent option, the carriage rights created by Section 614 are applicable to the station.

Finally, apparently in connection with the notion that cable subscribers should have advance warning of rate changes engendered by retransmission consent elections, the Commission "ask[s] commenters to address the interplay between retransmission consent and the cable compulsory license royalty regulations, which ... treat a signal as carried for a full six-month reporting period if it is carried for any part of the period." Notice at ¶50.

In general, it is not clear to us what the relevance of the question is to the timing of a retransmission consent election.[9] In any case, we urge the Commission here, and with respect to issues raised elsewhere in the Notice, not to complicate this proceeding unnecessarily by inviting debate on the cable compulsory copyright license. While there are undoubtedly many uncertainties about the marketplace implications of the coexistence of that copyright law provision and the retransmission consent regime, the Congress has made it clear that "[t]he principles that underlie the compulsory copyright license of section 111 of the copyright law...are undisturbed by this legislation". Conference Report at p.76. Congress may well turn its attention in the near future to copyright law reform issues.[10] In the meantime, the 1992 Act's mandate to the Commission should be interpreted as a direction to implement the communications policy goals of that legislation as simply and straightforwardly as possible.

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[9] We do not concede, of course, that retransmission consent elections will perforce involve costs that will be passed on to the consumer in basic service rate increases. However, as discussed infra, we agree with the Commission that it can and should defer consideration of "the appropriate treatment of retransmission consent compensation in the determination of basic service rates" to the companion proceeding which will consider all the rate issues associated with the 1992 Act. Notice at ¶69.

[10] Multichannel News, November 30, 1992, pp.84-5.

Retransmission Consent and Section 614

The Notice asks for comments on an "apparent ambiguity" in the 1992 Act as to whether certain provisions of Section 614 apply to broadcast signals carried under a retransmission consent election. Notice at ¶54. Section 614(b)(3) appears on its face to require cable systems to carry the complete program schedule, as well as all program-related ancillary transmissions of a broadcast station, regardless of whether that station is being carried under the must-carry procedures established generally in Section 614 or under the retransmission consent option provided in Section 325(b).[11]

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[11] In pertinent part, Section 614(b)(3) reads as follows:

> "(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmissions of each of the local commercial television stations carried on the cable system and to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers... ."
>
> "(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited [under the syndicated exclusivity, network nonduplication or sports blackout rules]." (Emphasis added)

In CBS's view, the breadth of this language is clearly deliberate and contrasts with other provisions of Section 614(b) which by their terms apply only to stations choosing the must-carry option. See, for example, Subsections 614(b)(6)-(10). This fact alone, we believe, belies the Commission's "tentative interpretation" that these provisions "apply only to local stations carried pursuant to an election of must-carry status." Notice at ¶55. The fact that these provisions are contained in Section 614, which generally provides the framework for the Commission's implementation of must-carry rules, does not justify a strained reading of the plain language of the statute.[12]

As noted above, we believe that the structure of the 1992 Act was designed so that Section 325(b) retransmission rights are distinct from, and superimposed on, the underlying signal carriage rights for commercial broadcast stations contained in Section 614. The most reasonable interpretation of the Congressional scheme as a whole is that the fact of a retransmission consent election, in and of itself, should not

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[12] Nor do we agree with the Commission that the title of the section ("Carriage of Local Television Signals") "by itself, suggests that the provisions appearing thereunder are waived if retransmission consent is elected." Notice at ¶56.

be interpreted as waiving provisions that by their terms apply to all broadcast stations. In this instance, we believe that the intent of Congress was that the public interest requires that cable operators should not have the statutory right to "pick and choose" among the program offerings (or for that matter delete the Line-21 captioning or other ancillary services provided by the broadcast station to serve the special needs of its audience) under either the retransmission consent or must-carry option.[13]

Retransmission Consent Contracts

The Notice asks whether the enactment of the 1992 Act requires amendment of the Commission's current rule which provides that "[w]here a television broadcast signal is carried by a cable system, the signal shall be carried without material degradation and programs broadcast shall be carried in full, without deletion or alteration of any portion

[13] Our conclusion that the unqualified language of Section 614 should govern in this situation is bolstered by the Conference Report, which states: "[Section 614(a)] requires each cable operator to carry the signals of local commercial television stations...in accordance with the provisions of this section, except to the extent that stations elect to exercise their rights to require retransmission consent under Section 325(b). Conference Report at p.66 (emphasis added). Since Section 325(b) is silent on matters involving manner of carriage, Section 614(a) should be deemed to be controlling.

thereof." 47 CFR 76.62. We have discussed above our view that provisions of Section 614 of the 1992 Act which by their terms apply to cable carriage of broadcast stations generally should be applied to stations opting for retransmission consent. If the Commission ultimately agrees with this interpretation, the general requirement of Section 614(b)(3) that a system "carry the entirety of the program schedule of any television station carried on the cable system" (emphasis added) would appear to subsume the existing requirement of full carriage of particular programs under §76.62 of the Commission's current rules.

With respect to the requirement for cable carriage of broadcast signals "without material degradation", Section 614(b)(4)(A) of the 1992 Act appears to track §76.62 of the current rules.[14] For the reasons just discussed in relation to carriage of the entire program schedule of a broadcast station, we believe that the new statutory provision should be read to apply to stations carried under either the retransmission consent or must-carry option.

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[14] "The signals of local commercial television stations that a cable operator carries shall be carried without material degradation." Section 614(b)(4)(A).

Under these circumstances, the Commission may wish to conform §76.62 to the language of Section 614(b), making sure that it is clear that the new provision, like the current §76.62, applies to all broadcast stations carried on the system.[15] Of course, if the Commission should decide, wrongly in our view, that cable systems are entitled to negotiate with stations over the technical quality of the cable signal and whether the complete signal and schedule must be retransmitted, the current §76.62 should be retained. In any case, there is no suggestion in the legislation that the general cable television technical standards should not be applicable to all broadcast signals carried on the system.

Program Exhibition Rights and Retransmission Consent

The Notice characterizes the essence of Section 325(b) correctly when it states that "when a station elects retransmission consent, a cable system (or other multichannel video programming distributor) must obtain the permission of the station to carry its signals -- even if the system has already secured permission to retransmit the individual

[15] The fact that these purportedly "ambiguous" provisions in Section 614 of the Act derive from, and at times track closely, provisions in the current rules which apply to all broadcast stations, supports our view that the Congressional intent was not to narrow their application to "must-carry" stations alone.

programs carried on the signal through either the cable compulsory license or the express agreement of the copyright holders." Notice at ¶64.

That is, retransmission consent represents a communications policy judgment of the Congress to allow stations to control the further distribution of their broadcast signals, independent of the copyright interests of the proprietors of individual programs. Thus, contrary to the suggestion in the Notice, it is not an open question "whether the broadcast station need obtain any permission from the copyright holders of its programming before granting retransmission consent to a cable system (or other multichannel distributor)." Notice at ¶65. It clearly need not.[16]

We are not blind to the reality that copyright considerations in general and the cable copyright compulsory

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[16] Generally, CBS suggests that a station's retransmission consent rights would not be "superseded" by the copyright interests which are the subject of program supply contracts. Notice at ¶65. As discussed above, however, we are hopeful that the program supply marketplace will adjust without pervasive regulatory intervention, and we do not believe that the Commission should attempt to resolve such copyright-related matters in the context of this proceeding.

license in particular will have an impact on how the marketplace responds to the implementation of the 1992 Act. While the Congress recognized this[17], it did not purport to legislate "solutions" to copyright-related issues that arise as the marketplace adjusts. And Congress certainly did not explicitly or implicitly mandate the Commission to regulate program rights licensing arrangements in the context of this proceeding or act as the arbiter of rights issues as they arise.

In CBS's view, even where copyright issues are not directly involved, the Commission should not intrude at this point with a pervasive regulatory scheme regrading the wide variety of contractual arrangements among affected parties which will undoubtedly develop in the context of retransmission consent. If, as marketplace adjustments proceed, market failures or other problems emerge which impede the intent of Congress to "permit the fullest applications of whichever rights each television station elects to exercise," [18]

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[17] "[T]he conferees recognize that the environment in which the compulsory copyright operates may change because of the authority granted broadcasters by section 325(b)(1)." Conference Report at p.76.

[18] Senate Report at p.38.

further Commission involvement may indeed be appropriate. But it would be fruitless and counterproductive for the Commission to overreact with preclusive decisions at this time.

Reasonableness of Rates

CBS agrees with the Commission's proposal to take up consideration of any rate regulation issues raised by Section 325 of the 1992 Act in the overall proceeding which the Commission must conduct on such issues under Section 623(b)(2). That proceeding must be completed at the same time as this one, so no time will be lost. Consideration of these matters at the same time the Commission considers other "direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier" is also appropriate because there is no reason to distinguish at the outset costs attributable to the retransmission consent option (if any) from other such costs.

Conclusion

CBS urges the Commission to view retransmission consent as the broadcast industry and the Congress view it; that is, as freeing up the marketplace to recognize and allocate the value of a television station's broadcast schedule to the

cable systems that retransmit it. The Commission's role in this proceeding should be to facilitate that marketplace process, not to bog it down in unnecessary regulation or contentious issues that are irrelevant to that mission. We believe that this approach serves the public interest in expediting the transition to a more equitable marketplace environment without disrupting the needs and expectations of the viewing audience.

Respectfully submitted,

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